IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 934 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE C.K.BUCH

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?	
5	Whether it is to be circulated to the civil judge ?	

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KAMABHAI ALIAS KAMLESH DALABHAI PATEL - Appellant(s)
Versus
STATE OF GUJARAT & 1 - Opponent(s)

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Appearance :
MR JV JAPEE for Appellant(s) : 1,
MR PD BHATE, LD.APP for Respondent (s) : 1,

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CORAM : HONOURABLE MR.JUSTICE C.K.BUCH

Date : 19/09/2007

ORAL JUDGMENT

1. Heard Shri J.V. Japee, learned counsel appearing for the, appellant and Shri P.D. Bhate, learned Additional Public Prosecutor, appearing on behalf of the respondent-State.

2. The appellant-orig.convict (hereinafter

referred to as 'the appellant') has preferred present appeal under Section 374 of the Code of Criminal Procedure, 1973, challenging the judgment and order of conviction and sentence dated 18th May 2004 passed by the learned Additional Sessions Judge, Second Fast Track Court at Deesa, in Sessions Case No.128 of 2003, whereby the learned trial Judge has held the appellant guilty for the charge of offence punishable under Section 376 of the Indian Penal Code; and sentenced him to undergo rigorous imprisonment for 07 (seven) years and to pay a fine of Rs.3000/- and in default of making payment of fine, he is ordered to undergo further six months' imprisonment. The learned trial Judge has also ordered to pay the said amount to fine to the victim girl as compensation.

3. Shri J.V. Japee, learned counsel appearing for the appellant, has taken me through the relevant part of evidence led by the prosecution and mainly the version of the victim girl, panchnama of the scene of offence

and the deposition of the doctor who had examined the victim girl. Shri Japee has also referred to the relevant part of the evidence of PW-2 Dr.D.D. Gehlot, who has been examined vide Ex.8. Shri Japee has made detailed submissions and if the said submissions are mentioned in brief, then the same are of two folds. The first fold of submissions of Shri Japee is that the appellant has been wrongly implicated because of some earlier land dispute and the victim girl was beaten up by the appellant as she was damaging the standing crop of the appellant in his field. During that innocent beating, the victim girl had fallen on earth and had sustained some injury by some stick like substance of the standing crop. The victim girl herself has admitted that the appellant was taking the crop from his field and she was also present in that field and she was passing through that field in playing mood. One reference of the third person comes on record. According to Shri Japee, the said person is one Varjan. He is

close to the family of the victim girl and serving with the Police Department. Initially, the parents of the victim girl were to lodge complaint because the victim girl was beaten by the appellant, but the son of the said Varjan had instigated them to file a complaint of serious offence and, therefore only, such a complaint of commission of rape was filed creating the story that the offending act of commission of rape was also witnessed by one unknown boy. The said unknown boy was never traced either by the police or family members of the victim girl and, therefore, obviously he has not been examined; and in such a situation, the learned trial Judge ought not to have linked the appellant with the crime. On the contrary, the appellant could have been acquitted giving him benefit of doubt.

4. The second fold of submissions of Shri Japee is that if the Court is of the view that some offending act is committed by the appellant qua the minor girl, then it was not at least rape punishable under Section 376 of the

Indian Penal Code. The hymen was found intact by the doctor who examined the victim. The injury which was found on the private part, mainly Labia Minora was superfluous and, therefore, the learned trial Judge ought not to have inferred penetration which is required to be proved by prosecution beyond reasonable doubt and at the most the appellant could have been held guilty for the offence punishable under Section 376 of the Indian Penal Code. In support of this submission, he has placed reliance on the decision in the case of ***Guddu alias Santosh v. State of Madhya Pradesh, reported in JT 2006(6) SC 120***. It is submitted that the facts in the case of Guddu (supra) are just similar to the present case and, therefore, the ratio of the cited decision would squarely help the appellant. In this cited decision, the minor girl was found injured on her private part and her Labia Minora was found reddish at the time when the doctor examined her medically. The hymen of the girl examined in the cited decision was

also intact. After referring to two decisions of the Apex Court in the case of ***Kappula Venkat Rao v. State of A.P., reported in 2004 (3) SCC 602 and another decision in the case of Aman Kumar and another v. State of Haryana, reported in JT 2004 (2) SCC 274***, the Apex Court held the appellant guilty for attempting the rape and had not believed the theory of penetration placed by the prosecution. He has also taken me through the observations made by the Apex Court in the case of Aman Kumar (supra). It would be beneficial to reproduce the relevant part of the above cited judgment which has been read over to the Court, as under :

> “14. .... xxx xxx xxx
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> “The actus reus is complete with penetration. It is well settled that the prosecutrix cannot be considered as accomplice and, therefore, her testimony cannot be equated with that of an accomplice in an offence of rape. In examination of genital

organs, state of hymen offers the most reliable clue. While examining the hymen, certain anatomical characteristics should be remembered before assigning any significance to the findings. The shape and the texture of the hymen is variable. This variation, sometimes permits penetration without injury. @page-SC1501 This is possible because of the peculiar shape of the orifice or increased elasticity. On the other hand, sometimes the hymen may be more firm, less elastic and gets stretched and lacerated earlier. Thus a relatively less forceful penetration may not give rise to injuries ordinarily possible with a forceful attempt. The anatomical feature with regard to hymen which merits consideration is its anatomical situation. Next to hymen in positive importance, but more than that in

frequency, are the injuries on labia majora. These, viz. labia majora are the first to be encountered by the male organ. They are subjected to blunt forceful blows, depending on the vigour and force used by the accused and counteracted by the victim. Further, examination of the females for marks of injuries elsewhere on the body forms a very important piece of evidence. To constitute the offence of rape, it is not necessary that there should be complete penetration of the penis with emission of semen and rupture of hymen. Partial penetration within the labia majora of the vulva or pudendum with or without emission of semen is sufficient to constitute the offence of rape as defined in the law. The depth of penetration is immaterial in an offence punishable under Section 376, IPC.””

5. Shri P.D. Bhate, learned Additional Public

Prosecutor, by interrupting Shri Japee when he was reading the cited decision in the case of Guddu (supra), has drawn the attention of the Court to two different decisions of the Apex Court; one in the case of ***Madan Gopal Kakkad v. Naval Dubey and another, reported in 1992(3) SCC 204, and another is reported in AIR 2004 SC 2636***, and has submitted that the facts of these two cases are also very similar to the facts of the present case and so also of the case in the case of Guddu. Shri Bhate has drawn the attention of the Court to the following main facts :

(i) In the present case, the Labia Minora was found injured. A tear of about 2 cms. was seen by the doctor when the victim girl was examined; and when the report of FSL analysing the muddamal was sent by the Police during the course of trial including the clothes of the victim girl, the blood of the victim and the appellant was found and even the urine of the victim girl was also found.

The serological examination speaks that urine of the victim girl was found with blood and semen; and in the same way, the lower petticoat, which is popularly known as “Ghaghri” in vernacular Gujarati language, was also found with blood and semen.

(ii) When the victim girl was undisputedly of about 8 years of age, it was not possible for the learned trial Judge to say that the injury found on the private part of the victim girl was an incidental injury or incidental to her fall when she was being beaten by the appellant.

(iii) The attempt to search the unknown boy by the family members and the Police was nothing but to search an important witness to the incident.

(iv) It is rightly argued that the parent of a minor girl aged about 8 may not have prepared themselves mentally to go to

the Police Station with an FIR of commission of rape to their minor daughter. So the inspiration given by any of the close relative may not be viewed with any doubt or an instigation merely because that relative was the son of a Police Officer. On the contrary, it is the duty of the Police Officer and each vigilant citizen to see that the correct report is given to the police, only then the Police can enter into detailed investigation with sincerity and sensitivity.

6. After going through some of the observations made by the Apex Court in the case of Guddu (supra) and after some deliberations, Shri J.V. Japee, learned counsel appearing for the appellant, has submitted that this Court may not assign any detailed reasons further for upholding the conviction. It appears that the recording of conviction is based on sound logic.

7. So looking to the evidence on record available with the Court, mainly the papar-book, the Court is satisfied that the learned trial Judge has correctly appreciated the evidence of the victim girl and she has stood to the test of cross-examination. She gets corroboration from the medical evidence as well as the report of the Public Analyst, as observed earlier. If the Court is able to listen the sound of truth in the version of the victim girl, then there was no need of any other evidence and on the sole testimony of the victim girl, the Court can convict the accused, is the settled legal position. It is also well settled that on the slightest penetration irrespective of the fact that the hymen is teared or not, the accused can be convicted for the offence punishable under Section 376 of the Indian Penal Code as observed in the case of Madan Gopal (supra). The fact that the Labia Minora was found teared, the learned trial Judge was right in inferring the slight penetration during the

offending act committed by the appellant.

8. The second fold of argument advanced by Shri J.V.Japee, learned counsel appearing for the appellant, is that as the victim girl was minor and below 12 years of age as per the evidence led by the prosecution and as such there was no serious dispute as to the age of the victim girl that she was below 12 years of age, the learned trial Judge could have imposed punishment utpo 10 years but it was open for the learned trial Judge to impose punishment lesser than 10 years and in the present case 07 (seven) years' rigorous imprisonment has been imposed. In the decisions cited by Shri Japee, in one case the accused was of 19 years of age and the victim girl was about 8 years; and in another case, the accused was of 18 years of age and the victim was also aged about 8 years. As per the proviso below sub-section (2) of Section 376 of the Indian Penal Code, the Court is empowered to impose lesser punishment than the minimum prescribed. According to Shri Japee,

as he has not pressed the conviction seriously and the appellant was of about 17 years of age at the time of commission of offence, the Court should show some leniency and the punishment may be reduced to five years. The doctor who has examined the appellant has said in his deposition that the appellant was a boy of about 17 years of age. But reduction of punishment to five years perhaps would not be an adequate punishment because if the appellant would have been held guilty for the offence of attempt to commit rape, then also the learned trial Judge could have imposed five years' rigorous imprisonment. But when the Apex Court has imposed 07 years' rigorous imprisonment in the case were the accused was of 19 years of age, in the present case, if the punishment is reduced by one more year and the appellant is asked to undergo rigorous imprisonment for six years, then also it would carry the same message of deterrence to the society at large. The Court also should be conscious of the fact that a teen-ager if is

kept for several years more in Jail, then he would become a harden criminal. The Court is also aware about the condition of jails and type of inmates in the common barracks. So reduction of one year in the substantive punishment imposed by the learned trial Judge may help the appellant in re-settling in his life. Basically the appellant was an agriculturist and a rustic villager. So the scope of improvement is substantially there. Of course, Shri Bhate has resisted for any reduction in the period of substantive punishment. But keeping the totality of facts and circumstances of case in mind, some reduction in the punishment if is made, it would meet the ends of justice. The Court can enhance the amount of fine and the appellant even can be asked to pay the additional amount of fine of Rs.4000/- and this amount of Rs.4000/- may go to the victim as compensation.

9. It is possible to state the details of some relevant evidence appreciated by the learned

trial Judge, but in view of above, it is not necessary to enter into further discussion and evaluation of the evidence made by the learned trial Judge as the Court is in agreement with the finding of conviction recorded by the learned trial Judge.

10. In view of aforesaid observations and discussion, the present appeal is hereby partly allowed. The judgment and order of conviction dated 18th May 2004 passed by the learned Additional Sessions Judge, Second Fast Track Court, Deesa in Sessions Case No.128 of 2003 is upheld and the substantive sentence imposed by the learned trial Judge is hereby modified and reduced to the extent that the appellant now shall undergo rigorous imprisonment for 06 (six) years instead of rigorous imprisonment for 07(seven) years by enhancing the amount of fine to Rs.10,000/- instead of Rs.6,000/-, confirming the indefault punishment. The appellant shall pay the amount of fine of Rs.10,000/- within a period of 15 days from the date of receipt of writ. On receipt of the said amount of fine by

the trial Court, the amount of Rs.9,000/- shall be paid to the victim girl as compensation on her proper identification.

(C.K. Buch, J)

Aakar